Supreme Court, U.S.
FILED
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(3) (5)

Nos. 97-296 and 97-454

# In the Supreme Court of the United States

OCTOBER TERM, 1997

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UNITED STATES OF AMERICA, PETITIONER

*v.*

CPC INTERNATIONAL INC.,
ET AL., RESPONDENTS

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MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
PETITIONER

*v.*

CPC INTERNATIONAL INC., RESPONDENT

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR RESPONDENT CPC INTERNATIONAL INC. IN OPPOSITION

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## QUESTION PRESENTED

Whether, on the facts of this case, CPC International Inc. participated so pervasively in the day-to-day management of the chemical manufacturing plant owned and operated by its wholly-owned subsidiary that CPC "operate[d]" the subsidiary's "facility" within the meaning of Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(2).

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the captions, the respondents in No. 97-454 are Aerojet-General Corporation, Cordova Chemical Company of Michigan, and Cordova Chemical Company. The petitioner in No. 97-296, the Michigan Department of Environmental Quality, formerly was known as the Michigan Department of Natural Resources. See No. 97-296 Pet. ii. For consistency with the petition in No. 97-296 and the proceedings in the courts below, we will continue to refer to the State agency as the "MDNR."

Respondent CPC International Inc. has no parent companies and has the following nonwholly owned subsidiaries:

Circulo Esmeralda, S.A. de C.V.
Corn Products Co. (India) Ltd.
Maghreb Alimentation S.A.
Maizena Brasil S.A.
Productos Modificados, S.A. de C.V.
Refinacoes de Milho, Brasil Ltda.
Refinerias de Maiz SAICF
S.B. Penick del Ecuador S.A.

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## BRIEF FOR RESPONDENT CPC INTERNATIONAL INC. IN OPPOSITION

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This Court has repeatedly declined to review the inherently fact-bound question whether a particular corporate or individual owner of a corporation should be subjected to "operator" liability under CERCLA where the owned corporation operated a "facility" at which hazardous waste is located.[1] The petitions in this case present no reason for the Court to depart from that prudent and consistent course. Moreover, as the decreasing frequency of the petitions indicates, the issue is losing rather than gaining importance, further reducing the need for this Court to sort out the facts of this case.

### STATEMENT

This case involves the allocation of liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), for the cleanup of a site near Muskegon, Michigan. Four separate successive owners manufactured chemicals at the Muskegon site: Ott Chemical Co. ("Ott I"), from 1957 to 1965; Ott Chemical Co. ("Ott II"), a wholly-owned subsidiary of respondent CPC International Inc., from 1965 to 1972; Story Chemical Co., from 1972 until it went bankrupt in 1977; and two wholly owned subsidiaries of cross-respondent Aerojet-General Corp. — Cordova Chemical Co. ("Cordova/California") and Cordova Chemical Co. of Michigan ("Cordova/Michigan") — from 1977 to 1986. U.S. App. 3a-4a.[2]

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[1] See *Livingstone* v. *Donahey*, No. 93-428, granted, vacated and remanded for reconsideration of attorney fee award, 512 U.S. 1201 (1994); *Riverside Market Ltd. Partnership* v. *Prescott*, No. 91-458, cert. denied, 502 U.S. 1004 (1991); *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, No. 89-1973, cert. denied, 498 U.S. 1108 (1991); *Powerline Supply Co.* v. *T.L. James & Co.*, No. 90-69, cert. denied, 498 U.S. 1108 (1991); *Kayser-Roth Corp.* v. *United States*, No. 90-816, cert. denied, 498 U.S. 1084 (1991).

[2] "U.S. App." refers to the appendix to the petition in No. 97-454.

### A. Factual Background

1. Ott I manufactured a variety of synthetic organic chemicals at its Muskegon facility. See U.S. App. 63a. In 1963, the chairman of CPC (then known as Corn Products Company), which specialized in wet-milled corn products, joined the Ott I board. *Id.* at 64a. In 1965, a subsidiary of CPC purchased the assets of Ott I and then adopted the Ott name. *Id.* at 65a.

Ott II continued Ott I's operations at the Muskegon site (U.S. App. 66a); later, it also operated a chemical manufacturing plant in Charlotte, North Carolina. *E.g.*, C.A. App. 2329, 2334, 2340-2343. As the district court found, "[t]he officers of Ott II remained identical to the officers of Ott I[.] * * * Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility." U.S. App. 66a.

The Ott II board of directors was "an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner." U.S. App. 67a. In particular, "[t]he board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal." *Ibid.*

Arnold Ott, president of Ott I, and James Eiszner, a vice president, assumed duties for CPC while retaining their positions with Ott II. U.S. App. 68a. Ott remained closely involved with the company that bore his name. He remained president of Ott II through 1966 and was its CEO and chairman of the board through 1969. *Id.* at 68a, 70a, 72a. Ott remained on the Ott II board after he resigned from CPC in 1969 (C.A. App. 731) and continued to advise his successors in management — actions that the district court attributed to his former employer, CPC. See U.S. App. 73a.



CPC's acquisition of Ott I typified the 1960s fashion for conglomerate acquisitions. CPC acquired a number of companies in businesses that were unrelated to wet-milled corn products, CPC's core business. The acquired companies were loosely federated within the Corn Products Development Company ("CP Development"), a division of the parent corporation. U.S. App. 70a. CP Development oversaw six CPC subsidiaries (including Ott II) and a research center. C.A. App. 3325-3326, 3331-3332, 3419-3420. CP Development reviewed Ott II's financial performance, projections, and large capital expenditure requests. U.S. App. 72a-73a. Like any substantial investor, CP Development "exert[ed] pressure [on Ott II] to generate more profits and enhance performance." *Id.* at 72a.

Unsurprisingly, some officers of Ott II, including Ott and Eiszner (who succeeded Ott as president of Ott II), held positions in the division that supervised Ott II; Ott was the first president of CP Development. U.S. App. 72a. Eiszner's successor as president of Ott II, Beverly Warner, moved in the other direction from president of CP Development to CEO of Ott II. *Ibid.* There was *no* evidence, however, that CP Development and Ott II were in any sense a single integrated enterprise.

Like virtually all parent corporations, CPC placed some employees on its subsidiary's board of directors. U.S. App. 67a-68a. If Ott I officers Ott and Eiszner are counted as CPC representatives, CPC employees at times made up a majority of the Ott II board. *Ibid.*; see C.A. App. 736-737. Only one of the CPC officers who served on Ott II's board was also a director of CPC (*id.* at 731-732, 736-737), however, and there was no evidence that CPC used its employment relationship with some Ott II directors in order to control Ott II's corporate policy.

To the contrary, Ott II corporate officers set the day-to-day operating policies for the company without any supervision or approval by CPC. See U.S. App. 69a. Until 1970, those officers included no CPC employees not drawn from Ott I. C.A. App. 738-740. Indeed, minutes from a 1967 Ott II board meeting

indicate that, according to CPC's chairman, the parent company did "not want[] to 'meddle' with" Ott II. C.A. App. 2210.

Actual practice accorded with this policy. The district court found that "[t]he Ott II management formulated and implemented the company's day-to-day operating policies" across the whole range of activities, "including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and," significantly for present purposes, "environmental matters." U.S. App. 69a.

2. Ott I discharged most of its industrial waste into seepage lagoons. See U.S. App. 60a-61a. Ott II took several steps to improve the waste disposal system. For example, it added and then redeveloped purge wells to confine and remove contaminated ground water, and it built an in-plant waste collection system and an equalization basin. C.A. App. 2228-2234. Ott II's state-of-the-art efforts to control its waste disposal were the subject of a technical journal article that concluded that the new system "achieved the goal of preserving the environment." Burt, *The Use, Abuse and Recovery of a Glacial Aquifer*, GROUND WATER, Jan.-Feb. 1972, at 65, 65.

CPC was not involved in the design or implementation of these projects. A CPC employee, G.R.D. Williams, attended a single meeting between Ott II personnel and Michigan Water Resources Commission staff in 1966. U.S. App. 75a. Uncontradicted testimony showed that Williams "had absolutely no responsibility or no authority within the Ott Chemical Company," but was "basically * * * a clerical figure who was keeping a record of all of the pol[l]ution control problems existing" in CPC and its subsidiaries. C.A. App. 2893-2894. Williams "had nothing to do with the development of [Ott II's] control of waste," but "was given copies after the fact of decisions which [Ott II] had reached." *Id.* at 2895-2896, 2914-2915. In CPC's view, Williams "could consult and he could advise, but he couldn't require anybody in any location to do anything." *Id.* at 3269; see also *id.* at 2995-2996.



3. After CPC had agreed in principle on December 31, 1971, to sell Ott II to the Story Chemical Company, CP Development essentially acted as Story's agent in overseeing Ott II. U.S. App. 72a, 74a. Although the day-to-day internal management of Ott II was unchanged (C.A. App. 3356), Ott II managers were "advised not to implement any changes in activity" without consulting CPC (U.S. App. 74a) so as to prevent the dissipation of assets for which Story had agreed to pay a set price (C.A. App. 3355).

Story acquired Ott II in 1972. U.S. App. 78a. Within two years, Story no longer used the purge well system regularly, accelerating the contamination of the property. *Ibid.*

The Michigan Department of Natural Resources (MDNR) turned its attention to the Muskegon site after Story's bankruptcy in 1977. U.S. App. 79a. MDNR sought a buyer for the Muskegon site that could contribute to the cleanup process. *Id.* at 81a. Aerojet, which sought a facility to make a chemical for its Cordova Chemical Company division, negotiated with MDNR and the bankruptcy trustee. *Id.* at 81a-82a. Aerojet incorporated the Cordova Chemical division as Cordova/California in October 1977; Cordova/California purchased Story's assets shortly thereafter, entering into a side agreement with MDNR. *Id.* at 82a-83a. Cordova/California incorporated Cordova/Michigan as a subsidiary in 1978, and transferred the Muskegon plant to the subsidiary. *Id.* at 94a.

**B. Proceedings Below**

1. Several CERCLA claims, counterclaims, and cross-claims were raised in a consolidated action in the United States District Court for the Western District of Michigan. In 1991, the district court found CPC, Aerojet, Cordova/California, and Cordova/Michigan jointly and severally liable for cleanup costs at the site. U.S. App. 128a-129a.

The district court held that CPC was liable as an "operator" of the Muskegon facility under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). In the court's view, "section 107(a)(2)

liability may attach to a parent corporation in two ways": direct liability, or liability through common law veil-piercing. U.S. App. 103a-104a. The court concluded that the statutory terms "owned or operated" somehow "forge[d] a new, middle ground" of liability (*id.* at 107a) — a "middle ground" that did not accord the full protection of the corporate form to any but the most passive parent corporations.

The district court defined its "new, middle ground" in these terms: "a parent corporation is directly liable under section 107(a)(2) as an operator" whenever "it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." U.S. App. 107a. Applying that test to the facts of this case, the court found CPC liable because "the evidence shows active participation and control by CPC in Ott II affairs." *Id.* at 111a.[3]

The district court recognized that its decision was *ad hoc* and fact-bound: "In the final analysis, each case must be decided on its own unique facts and circumstances." U.S. App. 108a. The court rested its conclusion principally on the presence of CPC employees at the highest levels of Ott II — most notably, Ott and Eiszner, who continued to have close involvement with Ott II after they assumed responsibilities at CPC. *Id.* at 70-71a, 111a. See MDNR Pet. 18. The court assumed that any officer or director of Ott II who also held a position at CPC performed his Ott II duties not as an agent of Ott II but as an agent of CPC. The court also noted that CPC had contributed cash to Ott II's expansion, had to approve large expenditures approved by Ott II's board, and on occasion had shared business and legal resources with Ott II (see U.S. App. 76a-77a) — although in the same breath the district court claimed that "monitoring of a subsidiary's financial perfor-

[3] In light of this conclusion, the district court did "not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing" (U.S. App. 112a).



mance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research" were *not* activities that supported liability. *Id.* at 108a.

The district court focused on the presence of persons with CPC ties in Ott II's upper management generally, rather than any CPC corporate involvement in operations or waste disposal at the Muskegon facility. U.S. App. 65a-78a, 110a-112a. The court also identified three ways in which CPC "actively participated in Ott II environmental matters." U.S. App. 74a. First, the court attributed to CPC as an entity all discussions by the Ott II board and management of Ott II waste disposal, because some Ott II officers and directors also held positions with CPC. *Ibid.* Second, the court rested heavily on G.R.D. Williams's participation along with Ott II management in internal discussions and in meetings with outside persons involving Ott II environmental matters. *Id.* at 74a-76a. Finally, the court noted that a CPC attorney negotiated the use of a county wastewater treatment system for Ott II. *Id.* at 76a.

The district court also held that Aerojet was liable as an "operator" of the Muskegon facility. The court concluded that, "[a]s with CPC's involvement with Ott II, Aerojet's participation and control over * * * Cordova/California and Cordova/Michigan shows that the parent operated the facility." U.S. App. 124a. In addition, the court held that Aerojet was separately liable as the "present owner" of the facility, finding a basis under Michigan law to pierce Aerojet's corporate veil and charge the parent with the obligations of Cordova/Michigan, which owns the Muskegon site. See 42 U.S.C. § 9607(a)(1).

2. The Sixth Circuit, sitting *en banc*, reversed the judgments against CPC and Aerojet under Section 107(a)(2). U.S. App. 1a-24a. Contrary to the district court, the court of appeals did not believe that "operator" liability could be imposed on a parent corporation based solely on an *ad hoc* analysis of "the degree of control exerted by the parent over its subsidiary."

U.S. App. 18a. Certainly, "the degree to which [a parent] controls its subsidiary and the extent and manner of its involvement with the facility" could render a parent liable as an operator of a facility operated by its subsidiary. *Id.* at 15a. But the Sixth Circuit did not find anything in the statutory definition of "operator" — "any person * * * operating such facility" — or elsewhere in CERCLA that "warrants the invocation by courts of vague, expansive concepts, such as the district court's 'new, middle ground,' which threaten the efficacy of time-honored limited liability protections afforded by the corporate form." *Id.* at 13a-14a.

Accordingly, the Sixth Circuit held that a parent may be held liable under Section 107(a)(2) only (a) "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" or (b) "by piercing the corporate veil" under state law (U.S. App. 17a; see *id.* at 15a). Applying that standard, the court of appeals held that there was no support in the record for imposing "operator" liability on either CPC (*id.* at 16a-18a) or Aerojet (*id.* at 22a). With respect to CPC, the court of appeals noted that the factors on which the district court relied revealed only "a parent that took an active interest in the affairs of its subsidiary." *Id.* at 17a.

## ARGUMENT

Petitioners invite this Court to embroil itself in an intensely fact-bound inquiry about what activities by a parent corporation render it liable under CERCLA as an "operator" of a hazardous waste facility owned and operated by the subsidiary corporation. All courts of appeals agree that there is a line over which a parent corporation may not cross without incurring liability as an "operator" of its subsidiary's facility. As the Sixth Circuit put it, "whether the parent will be liable as an operator depends upon * * * the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility." U.S. App. 15a. Each court of appeals ultimately sifts through the



totality of the circumstances to decide whether a parent company "operates" the facility that its subsidiary "operates."

The question presented here does not merit this Court's attention. This Court prudently has refrained from involving itself in the twists and turns of the lower courts' application of their fact-specific analyses, long tolerating the differences in phraseology between the First and Fifth Circuits. The United States acknowledges that the question of parent-subsidiary liability does not recur frequently. CERCLA issues generally are diminishing in importance as fewer covered sites are identified and as the 1980 enactment of CERCLA — which first warned companies, although not parent companies of legitimate subsidiaries, that they might be federally liable for all persistent hazardous waste — fades further into the past.

Moreover, the Sixth Circuit, like the Fifth Circuit years ago, correctly held that the word "operates" did not express congressional intent to override the existing well-settled law governing the liability of parent corporations for actions of their subsidiaries. In any event, CPC would not be liable even under a principled application of the "pervasive control" test for which petitioners seem to argue. Because further review by this Court is not warranted, the petitions should be denied.

### I. WHETHER CPC "OPERATED" THE MUSKEGON FACILITY PRESENTS A FACT-BOUND ISSUE NOT WARRANTING REVIEW

A. The courts of appeals repeatedly have recognized that "an inherently fact-intensive inquiry * * * involving consideration of the totality of the circumstances presented" underlies every "determination whether a corporation has exerted sufficient control" of its subsidiary "to warrant imposition of operator liability." *Lansford-Coaldale Joint Water Authority* v. *Tonolli Corp.*, 4 F.3d 1209, 1222 (3d Cir. 1993); see also, *e.g.*, *Schiavone* v. *Pearce*, 79 F.3d 248, 255 (2d Cir. 1996). Not only is the placement of a specific set of intercorporate relations on a spectrum ranging from legitimate to excessive control neces-

sarily "fact-laden," *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993), but this case remains in an interlocutory posture. The Sixth Circuit remanded for further evaluation of the liability of Cordova/California and Cordova/ Michigan (see U.S. App. 22a-24a), which precludes the entry at this juncture of any "judgment adjudicating all the claims and the rights and liabilities of all the parties" (Fed. R. Civ. P. 54(b)).

It is important to bear in mind what questions are *not* presented here. This case does not involve the liability of individuals for waste disposal they personally performed or ordered performed while acting as officers of a company. Likewise, there is no dispute among the courts of appeals that operator liability attaches to a parent corporation that "directly operates [a] facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" (U.S. App. 17a), as could occur if the subsidiary were engaged in a similar business such that the parent could take advantage of the subsidiary's facility, or if the subsidiary owned real estate or other assets that the parent used in its business. Thus, MDNR flatly misrepresents the holding of the Sixth Circuit as precluding all "operator" liability on the part of a parent corporation at a facility owned and operated by a subsidiary unless "the requirements to pierce the corporate veil under state law are met." MDNR Pet. 6.

Upon examination, petitioners' chief complaint seems to be that the Sixth Circuit, unlike the district court, did not attribute all of Ott II's actions to CPC because the court of appeals did not implicitly assume that Ott II officers and directors who had ties to CPC acted as *CPC's* agents whenever they acted in their capacities within *Ott II*. But in assuming instead that Ott II officers and directors acted in their capacities within Ott II, rather than as infiltrators for CPC, the Sixth Circuit merely followed the well-established presumption that, unless the evidence shows that the individuals "favor[ed] the interests of one corporation while sacrificing or betraying those of the other," the individuals' acts taken in the course of managing the



subsidiary are by and for the benefit of the *subsidiary*, not instances of manipulation by the *parent* in disregard of the subsidiary's interest. *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 197 F.2d 994, 1000 (9th Cir. 1951) (emphasis deleted), order denying reh'g en banc vacated and remanded, 345 U.S. 247, reh'g denied on remand, 206 F.2d 495 (9th Cir.), cert. denied, 346 U.S. 910 (1953). See also, *e.g.*, *Pullman's Palace Car Co.* v. *Missouri Pacific Ry.*, 115 U.S. 587, 596 (1885); *Edwards Co.* v. *Monogram Industries, Inc.*, 730 F.2d 977, 985-986 (5th Cir. 1984) (en banc); *Fisser* v. *International Bank*, 282 F.2d 231, 238 (2d Cir. 1960); *Wiseman* v. *United Dairies*, 324 Mich. 473, 37 N.W.2d 174, 182 (1949).

Petitioners can point to nothing in CERCLA that purports to alter that rule of law. When petitioners' erroneous assumption is disregarded — an assumption that would effectively transform into acts of a parent all acts approved by directors or officers of a subsidiary who have fiduciary or employment duties to the parent-shareholder — the limited significance of the decision below fades still further.

B. Petitioners try to inflate the significance of this case by mischaracterizing the facts found by the district court, as well as the Sixth Circuit's response to those findings and their adequacy. For example, MDNR (Pet. 18) claims that "CPC was directly involved in the operation at the [Muskegon] facility"; the United States likewise asserts (Pet. 10) that the district court found that "CPC * * * had directly participated in the operation of the Muskegon site." But the district court's findings (even if they could have survived clear-error review) did not go so far, but rather concentrated on CPC's supposed participation in the upper management of Ott II rather than the operations at the Muskegon site.[4] MDNR claims (Pet. 18 n.4) that the district court "found that CPC did, in fact, control * * * waste disposal

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[4] In the court of appeals, CPC pointed out the lack of record support for many of the district court's findings. See generally CPC Opening C.A. Br. 5-38.

at the site"; the district court made no such finding, however, and the facts it did find would not have supported that conclusion. See U.S. App. 74a-76a.

The United States also claims (Pet. 17) that "the district found that [CPC] had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site." But the blanket citations the United States provides (see U.S. App. 67a-77a, 110a-112a) do not reflect any finding by the district court about CPC's motivation for allowing Ott and Eiszner to continue running what had been Ott's company, nor do the findings reflect anything reasonably resembling "close control" by CPC "over the day-to-day running of [Ott II]'s business at the Muskegon site."

Attempting to obscure the fact-specific character of the question presented here, the United States recites (Pet. 10-11) the district court's legal conclusions (under its "new, middle ground" standard) that CPC "actively participated in and exerted control over" various aspects of Ott II's business, while carefully eliding the flimsy underlying facts on which those conclusions were based. See pp. 2-7, *supra*. And MDNR asserts (Pet. 19) that the Sixth Circuit did not explicitly reject the district court's findings of fact as clearly erroneous.

But the dearth of factual support for the district court's broad conclusions did not escape the Sixth Circuit's notice. To the contrary, the court of appeals noted that "*[i]f anything*, the *facts* recited by the district court" might "support liability" under a theory of "exertion of power or influence through active participation in the subsidiary's business," but certainly could not support liability based on "actual operation of the subsidiary's business" — much less *operation of its facility*. U.S. App. 12a (emphasis added). As petitioners' factual quibbles make clear (*e.g.*, U.S. Pet. 20 n.6; MDNR Pet. 18-19 & n.4), the Sixth Circuit plainly and dispositively rejected as



factually unsupported the district court's findings on this and other issues. See, *e.g.*, U.S. App. 12a, 18a, 21a-22a, 24a.

C. In another attempt to broaden the significance of the question presented, MDNR asserts (Pet. 14) that the Sixth Circuit overlooked the strict liability that has been implied into CERCLA. But that argument puts the cart before the horse. As the United States acknowledges (Pet. 6), strict liability applies only after the plaintiff "has established the four elements of CERCLA liability." That a defendant is an operator or other responsible party is one of the "four basic elements" that must be proved *before* strict liability attaches. See *id.* at 5. The existence of strict liability does not displace the analysis for determining whether the preconditions for liability apply. As the Sixth Circuit recognized, that persons subject to a definition may be subject to strict liability does not provide a bootstrap justification for broadening the definition to cast "the widest net possible." U.S. App. 9a.

D. At bottom, the question presented by this case is whether the facts showed that two particular parent corporations, CPC and Aerojet, were sufficiently involved in the operation of the Muskegon facility by their subsidiaries to transform them into "operators" of the facility themselves. That issue does not merit the attention of this Court.

This case is of narrow significance for additional reasons. The United States (Pet. 26-27) concedes that it "does not routinely seek to hold parent corporations liable for conditions at a subsidiary's facility." And although the United States now asserts, for litigation purposes, that the conditions at the Muskegon site are "acutely hazardous," the government's inaction belies that claim. At trial, ten years after the Environmental Protection Agency "identified" what it calls "extraordinary public health risks" at the site (U.S. Pet. 9), EPA's sole

response was to engage in planning (U.S. App. 63a) rather than actually remediating those supposedly "acute[]" hazards."[5]

Now that CERCLA has been in place for 17 years, it is safe to assume that the great bulk of sites potentially within the scope of that statute have been identified and relevant litigation commenced, if not concluded. EPA has deleted three-quarters of the sites listed among those potentially requiring remediation, while the National Priorities List has been essentially stable for the past several years, with a handful of additions and deletions annually.[6] As additions to the Priorities List slow to a trickle — and may be legislatively capped before long — the limited importance of parent corporation liability for the operations of subsidiaries can only diminish further. See, *e.g.*, *Senate Legislation Would Make Major Changes In Liability, Site Cleanup*, SOLID WASTE REP., Aug. 21, 1997, at 259.

Finally, any decision by this Court in this case may well be mooted by congressional action. Congress has been considering legislation to restrict the scope of liability under CERCLA. See, *e.g.*, S. 8, 105th Cong., 1st Sess. (1997); H.R. 2727, 105th Cong., 1st Sess. (1997); H.R. 2750, 105th Cong., 1st Sess. (1997); H.R. 2485, 105th Cong., 1st Sess. (1997). See generally Johnson, Note, *Mr. Smith Goes To Washington: 1997 Superfund Amendments*, 31 NEW ENG. L. REV. 1269 (1997). The congressional leadership has made CERCLA reform "an

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[5] According to the EPA, legal disputes "have very little impact on the pace of cleanups." EPA, *The Facts Speak For Themselves: A Fundamentally Different Superfund Program* 9 (Nov. 1996).

[6] See, *e.g.*, *Superfund Reauthorization: Hearings Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Cong., 1st Sess. 454 (April 12, 1997) (Testimony of Steven A. Herman, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, and Timothy J. Fields, Jr., Acting Assistant Administrator, EPA Office of Solid Waste and Emergency Response); U.S. General Accounting Office, GAO/RCED-97-20, *Superfund: Times to Complete the Assessment and Cleanup of Hazardous Wastes* 8 (March 1997) (16 average annual NPL listings 1992-1996).



important priority," *GOP Agenda Includes Bill to Reform Hazardous Waste Cleanups*, DAILY ENV'T REP. (BNA), Jan. 22, 1997, at AA-1, and markup appears imminent for at least one bill. *Boehlert Schedules Markup Date for Bill Despite Differences with Democrats*, DAILY ENV'T REP. (BNA), Nov. 7, 1997, at A-2. Indeed, "[o]ne of the many issues to be tackled" is the standard for holding "shareholders — and parent corporations as controlling shareholders of their subsidiaries — liable as 'owners or operators' of the businesses in which they had an interest." NAT'L L.J., Sept. 22, 1997, at B4. The Senate leadership has conducted "more than 220 hours of discussion and negotiation," and both houses have held hearings on CERCLA reform. *Superfund Legislation: Hearings before the Sen. Environment and Public Works Comm.*, 105th Cong., 1st Sess. (Sept. 4, 1997) (statement of Sen. Chafee); *Boehlert, Browner Face Off at Hearing Over Small Party Definitions, Ground Water*, DAILY ENV'T REP. (BNA), Oct. 30, 1997, at A-5; see also n. 6, *supra*.

Whether CERCLA should alter prevailing state-law standards of parent-subsidiary liability is quintessentially a legislative policy judgment — and a judgment that this Court's precedents require Congress to make clearly if "pre-existing state law" is to be "displace[d]." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994). If the issues in this case are as important as petitioners assert, Congress may well enact clarifying amendments to Section 107 and other provisions, perhaps before this Court could hear this case, much less decide it. Such an exercise, particularly at this interlocutory stage, does not warrant the expenditure of this Court's scarce resources.

## II. THE SIXTH CIRCUIT CORRECTLY DECLINED TO IMPROVISE A NEW FEDERAL STANDARD OF PARENT-SUBSIDIARY LIABILITY

A. This case not only presents no issues of sufficient general and recurring importance to warrant further review, but the Sixth Circuit correctly applied "traditional concepts of limited liability associated with the corporate form" to structure

its analysis. U.S. App. 12a. "Congress acts * * * against the background of the total *corpus juris* of the states." *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)). Limited liability through the use of the corporate form "is ingrained in our economic and legal systems." Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929).

There is no serious dispute that the statutory text of CERCLA does not "express any intention to hold parent corporations or other shareholders individually liable for corporate activities." Farmer, Note, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769, 780 (1994). Because Congress did not "speak directly to the question," unless a contrary legislative intent is "evident" statutes that, like CERCLA, "invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles" governing the corporate form. *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).

Thus, a "party contending that legislative action changed settled law" has the burden of proving "that the legislature intended such a change." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). Petitioners cannot carry that burden.[7]

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[7] The legislative history of CERCLA, although sparse on this point, indicates that Congress intended traditional common law principles to govern all interstitial issues of liability. Like the statute itself, the committee reports on CERCLA say nothing about parent-subsidiary liability or piercing the corporate veil. In their nearest approach to the subject, the sponsors of the legislation repeatedly expressed their intent that "issues of liability not resolved by [CERCLA]" should be governed by "traditional and evolving principles of common law." See, *e.g.*, 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph); *id.* at 31,965 (statement of Rep. Florio).



Unlike CERCLA, some federal statutes expressly provide that persons normally protected by the corporate veil may be subjected to statutory liability for the acts of their corporations. See, *e.g.*, Clayton Act, 15 U.S.C. § 24; Securities Exchange Act of 1934, 15 U.S.C. § 78p(b); Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; I.R.C. § 1239-(b)(2), (3); Fair Labor Standards Act, 29 U.S.C. § 203(r); ERISA, 29 U.S.C. § 1301(b). CERCLA's silence on this issue "is most eloquent" and should be dispositive evidence that Congress did not intend to work "an important and controversial change in existing law" by altering the treatment of the corporate form. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)

The plain meaning of CERCLA likewise supports the Sixth Circuit. Section 107(a)(2), which refers to "any person who * * * operated any facility" (42 U.S.C. § 9607(a)(2)), imposes liability on the persons directly responsible for the day-to-day operations *of the facility* that disposed of the hazardous waste. Yet petitioners' reading would transmute the unadorned word "operator" into "one who owns and oversees a legally separate operator." See *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 515-516 (1963) (favoring "normal and usual meaning" of statutory term over definition that would stretch simple phrase to cover complex two-stage process). By marshaling "all the facts regarding CPC's *involvement with Ott II*" (U.S. App. 110a (emphasis added)), and by holding CPC liable not for operating the Muskegon facility but for allegedly "operating" Ott II — a conclusion that itself was unsustainable — the district court rewrote CERCLA to impose liability upon a person simply for "operating" another legal person that operated a facility, producing the very sort of strained "two-stage" reading rejected in *Sun Oil*, 371 U.S at 514-516.

To the contrary, this Court long ago drew a clear distinction between operating a subsidiary's facility, in that case a railroad, and controlling the subsidiary company. After noting that the parent held virtually all the subsidiary's stock, and the

same individuals held similar positions as directors and management officials within the two companies, the Court nonetheless concluded that the separately incorporated subsidiary "operate[d] its own road." *Pullman's Palace Car Co.*, 115 U.S. at 589, 596. Although "[p]ractically [the parent] may control the [subsidiary] company, * * * the [subsidiary] alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs." *Id.* at 597.

B. Petitioners' contrary argument relies on a patchwork of assumptions and *non sequiturs*, rather than anything that Congress enacted, to override the governing legal principles. The centerpiece of petitioners' argument is that the imposition of liability on "operators" as well as on "owners," along with the unremarkable statutory acknowledgment that a "person" includes a "corporation," evidences congressional intent to do away with the preexisting protections of the corporate form.

As the United States' tour (Pet. 17) through dictionary definitions amply demonstrates, the common meaning of "operate" sheds no light on whether a parent corporation or other majority shareholder of a corporation that operates a facility is itself a second-level operator of the facility as well. Certainly, as the Sixth Circuit observed, "[if Congress wanted to extend liability to parent corporations" in a non-traditional way "it could have done so, and it remains free to do so." U.S. App. 14a (quoting *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991)). But what Congress did in many other statutes, see p. 17, *supra*, it did *not* do here.

The decision below in no way blurs the distinction between owner and operator liability. Petitioners apparently believe that the principal distinction between "owning" and "operating" a facility must lie in the methods by which parent corporations



may be held liable under each theory.[8] The distinction based on plain meaning is far simpler. One can be liable as an operator but not an owner by conducting operations at a site that one does not own. Lessees and landowners often are defendants together in CERCLA cases, though the owner conducted no operations and the lessee did not own the site. *E.g.*, *Joslyn Manufacturing Co.* v. *Koppers Co.*, 40 F.3d 750, 753 (5th Cir. 1994); *United States* v. *R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991). And a parent corporation could be directly liable as an operator at a facility owned by its subsidiary if, for example, the subsidiary existed only to hold title to real estate. Similarly, as noted above (at p. 10), a parent could "operate" a facility that was owned and also operated by its subsidiary.[9] That might have occurred here had the facts been different: for example, if CPC manufactured corn products at the Muskegon site (and disposed of the wastes) while Ott II made chemicals, or if CPC used the lagoons at Muskegon in order to dump wastes from CPC's own, off-site manufacturing processes. That CPC did none of these things does not mean that the legal definition of "operator" must nullify the corporate form.

Still more circular is the argument that, by including corporations among "persons" potentially liable as operators under CERCLA (see 42 U.S.C. § 9601(21)), Congress silently did away with the usual protections of the corporate form. If corporations were not included among "persons," even Ott II could not be liable as an operator. But the word "corporation"

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[8] MDNR (Pet. 11) objects that, "[u]nder the Sixth Circuit's decision, the standard for determining whether a parent corporation is liable as either an owner or operator would be the same: the facts must support piercing the corporate veil." But that is how American law determines the liability of a parent corporation for obligations of its subsidiary, whether the liability rests on what the subsidiary owned or on what the subsidiary did.

[9] In his seminal article, then-Professor Douglas noted that in this and the preceding example of a parent corporation's direct liability, "no question of vicarious liability [i]s involved" and thus the corporate veil does not need to be pierced. Douglas & Shanks, *supra*, 39 YALE L.J. at 209-210.

does not normally include a separate corporation that is the parent company of the first. Congress easily could have specified "parent corporation of a person" or "majority shareholder of a person" in the definition if it wanted to go beyond the usual scope of liability. It did not.

Finally, the Sixth Circuit was correct in refusing to rely on terms used in definitions adjacent to, but not included in, the relevant definition. The definition of "owner or operator" that applies to this case is purely circular: "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). The United States insists here (Pet. 18-19), as it did below, that parent liability should be governed by an *adjacent* definition, applicable only when a governmental authority has come into possession of an *abandoned* facility. In that instance, the statute imposes liability on "any person who * * * otherwise controlled activities" at the facility immediately before abandoning it. But "[a]s this Court has reiterated: 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates* v. *United States*, No. 96-7185, slip op. 5-6 (U.S. Nov. 4, 1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The Sixth Circuit understood "that the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." U.S. App. 13a.[10]

C. The *ad hoc* "operator" analysis that petitioners endorse is nothing more than a junior-varsity veil-piercing analysis,

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[10] The language of CERCLA also forecloses MDNR's argument (Pet. 10) that "participat[ing] in the management" of a subsidiary renders a parent corporation liable as an operator of the subsidiary's facility. A person who appears to be the legal owner of a facility, but who actually holds only a security interest in the property "without participating in the management of a * * * facility," is not subject to liability. 42 U.S.C. § 9601(20)(A). Thus, Congress restricted liability for merely "participating in the management of a * * * facility" to persons who, but for the operation of the security interest exception, plainly would be liable as owners. *Ibid.*



using the same or similar factors but substantially lowering the threshold for imposing liability. Whether the parent owns all of the stock of the subsidiary, whether there are common directors and officers, whether the parent uses the subsidiary's property, whether the parent exercises control over the subsidiary's business decisions, and whether the parent is involved in the subsidiary's financial affairs all regularly appear in veil-piercing analyses. See P. BLUMBERG, LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 1.02.1, at 16-17 (1983); S. PRESSER, PIERCING THE CORPORATE VEIL § 1.03[4] (1992).[11]

In fact, the principal factors on which the district court and petitioners would rely to make a parent the "operator" of its subsidiary's facility typify the parent-subsidiary relationship. By definition, a parent corporation controls its subsidiary. BLACK'S LAW DICTIONARY 1428 (6th ed. 1990). See 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 120.05[2] (1993). Thus, almost all parents "participat[e] in the subsidiary's board of directors [and] management" and are involved in "specific policy matters" such as finances. Compare U.S. App. 107a with *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 759 (7th Cir. 1989), and *Maki* v. *Copper Range Co.*, 121 Mich. App. 518, 328 N.W.2d 430, 433 (1982); see also H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 148, at 355 (3d ed. 1983) ("normal" for parent and subsidiary to have "identical directors and officers"); *Maki*, 328 N.W.2d at 432 (parent-subsidiary relation "by definition" includes, *e.g.*, disbursements by parent for subsidiary).

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[11] It should come as no surprise that the factors relied on by the district court in this case (see U.S. App. 66a-78a, 110a-112a) pertain to veil-piercing: one of the first courts to recast a watered-down veil-piercing analysis in terms of "direct" operator liability used the same factors to impose "direct" operator liability as for piercing the corporate veil. See *United States* v. *Kayser-Roth Corp.*, 724 F. Supp. 15, 22, 24 (D. R.I. 1989), aff'd, 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991). See U.S. App. 103a-108a (heavily relying on *Kayser-Roth*).

Because ownership of a subsidiary's stock, and the presence of common officers and directors, are "features that are common in most or all parent-subsidiary relationships," they "have been uniformly dismissed as inconsequential in and of themselves." BLUMBERG, *supra* § 1.02.1, at 17-18. In fact, the ultimate question in the district court's analysis, "the parent's exercise of control[,] * * * occurs in every parent-subsidiary relationship." *Id.* at 18. The other factors amount to mere oversight functions and the occasional provision of expertise in specific areas. See *Johnson* v. *Flowers Industries, Inc.*, 814 F.2d 978, 982 (4th Cir. 1987) (role of parent company's regional representative "to ensure that [subsidiary] implements the policy of the parent company" is "characteristic of a parent-subsidiary relationship"); *Maki*, 328 N.W.2d at 433 (refusing to assign significance to likelihood that "parent may monitor the subsidiary's fiscal activities and dealings").

One thing is clear: none of this has anything to do with the statutory standard of whether the parent corporation is actually *operating* its subsidiary's *facility*.

D. Petitioners' invocation of the rule that corporations are liable for the torts of their agents produces another circularity. The individuals through whom petitioners sought to hold CPC liable for Ott II's operations were agents of CPC only if, contrary to well-established precedent (see pp. 10-11, *supra*), dual officers and directors are assumed to be agents of the parent even when they act in their capacities with the subsidiary, or if the corporate separateness of the subsidiary can be assumed away. But petitioners can point to nothing in CERCLA that reflects Congress' intent to override either of those familiar common-law principles. Their argument simply begins from a conclusion and works backward.

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"Private parties have relied on state corporation law when making corporate acquisitions and in forming and dissolving corporations." *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring). The Sixth Circuit properly concluded that the "disrupt[ion of] commercial relationships predicated on state law" is unwarranted where there is no sign that Congress intended to work that result in CERCLA. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979). There is no reason for this Court to a review a decision so squarely in line with governing principles.



## III. CPC IS NOT LIABLE AS AN "OPERATOR" OF THE OTT SITE UNDER THE LIABILITY STANDARD SUPPORTED BY PETITIONERS

The petition should be denied for the additional reason that, under any reasonable standard of liability, the result would be the same.[12] Indeed, if the United States truly means to advocate a standard that would impose liability only on parent corporations that "actually participate[] in the *day-to-day operation of a subsidiary and its facility*" (Pet. 27-28; emphasis added), then no liability could attach to CPC, which was far removed from the "day-to-day operation" of Ott II, and still further removed from the actual operation of the Muskegon facility.

Petitioners claim that the holdings of the courts of appeals are "squarely conflicting." U.S. Pet. 28. The conflict is neither as direct nor as deep as petitioners suggest. Only the cases cited from the First Circuit (U.S. Pet. 23) actually imposed liability on parent companies. The Second, Third, Fourth, and Eleventh Circuits have yet to impose "operator" liability on a parent corporation, although the Third Circuit held that the federal government "operated" a plant it commandeered during World

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[12] Like petitioners, we place to one side the outlier decision in *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), cert. denied, 506 U.S. 940 (1992), which suggested (in *declining* to impose liability) that "direct" liability might attach to all majority stockholders of "operators." Although petitioners cannot bring themselves to defend that bizarre conclusion, it is the logical outgrowth of their rejection of traditional veil-piercing principles.

War II, where the government "determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold" — none of which CPC did in Muskegon. *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc). There is less to the supposed "conflict" than meets the eye.

Moreover, as commentators have observed, although courts may vary in their formulations, "the liability of a parent corporation is the same regardless of whether liability is premised on traditional corporate law," as in the Fifth Circuit's 1990 *Joslyn* decision and the decision below, or on "direct statutory liability under CERCLA," as in *United States* v. *Kayser-Roth*, 910 F.2d 24 (1st Cir. 1990), cert. denied, 490 U.S. 1084 (1991), based on a perception that Congress modified traditional corporate law by using the word "operator." Oswald & Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 315 (1992). This case illustrates the point.

A. Aside from the United States' hint noted above, petitioners do not articulate the precise standard of parent corporation "operator" liability that they urge this Court to adopt. The United States cites (Pet. 22) four decisions from other circuits that "essentially agree with the standard that the United States urges"; MDNR appears to support a similar standard. See *Kayser-Roth*, 910 F.2d 24; *Schiavone*, 79 F.3d 248; *Lansford-Coaldale*, 4 F.3d 1209; *Jacksonville Electric Authority* v. *Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993). But several of the cited cases themselves sidestep a definition of the governing standard. The First Circuit in *Kayser-Roth* candidly acknowledged that its decision did not decide "the exact standard necessary for a parent to be an operator." 910 F.2d at 27. Similarly, in *Schiavone*, the Second Circuit noted that it, too, had not endorsed any standard of parent corporation liability and "decline[d] to do so." 79 F.3d at 254 n.5; see also *Certain Underwriters at Lloyd's* v. *St. Joe Minerals Corp.*, 90



F.3d 671, 674 (2d Cir. 1996) (again declining to identify standard).

To a substantial degree, therefore, the decisions upon which petitioners rely are self-consciously fact-bound. Indeed, in the Second Circuit's view, the determination "whether there exists control sufficient for the imposition of operator liability" requires "an inherently fact-intensive inquiry." *Schiavone*, 79 F.3d at 255. The Third Circuit agrees that the inquiry is "inherently fact-sensitive" and requires "consideration of the totality of the circumstances presented." *Lansford-Coaldale*, 4 F.3d at 1222.

To the extent that these cases express a rule of law, it is that a parent corporation will be held liable as an "operator" of a facility operated by its subsidiary if the parent exercises "pervasive control" over the subsidiary. *E.g.*, *Kayser-Roth*, 910 F.2d at 27. See U.S. Pet. 23. The First Circuit in *Kayser-Roth* affirmed the imposition of "operator" liability on a parent that had exercised "total influence and control" and "pervasive control" over its subsidiary. 910 F.2d at 27 (quoting district court decision). (Indeed, the First Circuit had no need to go beyond veil-piercing, as the district court had also pierced the corporate veil. See 724 F. Supp. at 24.) Likewise, in *Jacksonville Electric*, the Eleventh Circuit suggested that a parent corporation would be liable for the operations of its subsidiary only if the parent "exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary." 996 F.2d at 1110 (quoting district court opinion). And the Third Circuit held in *Lansford-Coaldale* that a parent corporation could be liable as an "operator" for the operations of its subsidiary if the evidence "sufficiently demonstrate[d] pervasive control." 4 F.3d at 1222 n.13.

2. Although the district court broadly *concluded* that CPC "controlled" Ott II, the *facts* found by the district court make clear that CPC did not exercise "pervasive control" over operations at the Muskegon facility. The district court did not

even find that CPC exercised "pervasive control" over Ott II (much less its waste disposal "facility").

In fact, CPC would not be deemed a CERCLA "operator" of the Muskegon facility under any reasoned application of the standard that petitioners advance. Ott II's overall policies were established by *its* board of directors, which "was an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner," and was "[f]ar more than a rubber stamp for management." U.S. App. 67a. Day-to-day operations at the Muskegon site were conducted by Ott II managers, *not* by CPC: "Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC"; "Ott II management formulated and implemented the company's day-to-day operating policies, including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing and environmental matters." *Id.* at 69a. Compare *Kayser-Roth*, 910 F.2d at 27.

The district court also found that Ott II operated essentially as Ott I had operated. Using the same personnel and the same officers as Ott I, Ott II manufactured the same products as Ott I and sold those products to Ott I customers under the same Ott nameplate. U.S. App. 66a. These findings belie the district court's ultimate legal conclusion that somehow CPC took over operations at Ott II's Muskegon site.

Indeed, the district court never even squarely addressed whether CPC actually operated the Muskegon *facility* (as opposed to "operating" the overall business of Ott II, which among other things included the sale of chemicals as well as their manufacture at the Muskegon and Charlotte plants). But, as noted above, CERCLA does not impose liability on persons that operate *other persons*; a person is liable only for operating a *facility*, that is, the building, ditch, or other area where hazardous waste has been deposited. See 42 U.S.C. § 9601(9);



*Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842-843 (4th Cir.), cert. denied, 506 U.S. 940 (1992). As the court of appeals correctly pointed out, the theory that CPC might be liable under Section 107(a)(2) because it actually conducted day-to-day operations at the Muskegon site was neither "relied upon by the district court" nor "supported by the facts in the record." U.S. App. 18a.

Instead, the district court relied on the mere presence of individuals with CPC affiliations serving in the management and on the board of Ott II to support "operator" liability:

> When a parent corporation permeates the board, management and decision making of a wholly owned subsidiary that was disposing of hazardous waste, operator liability directly attaches under CERCLA.

U.S. App. 111a-112a. The other factors — CPC's ownership of 100% of Ott II's stock, its approval of large capital expenditures and review of budgets through CP Development, its assistance on a handful of occasions in labor negotiations and environmental matters, and its intermittent provision of a few other corporate services (U.S. App, 110a-111a) — plainly do not demonstrate "pervasive control" by CPC over day-to-day operations at the Muskegon site, much less control over the use of the "facility" at issue, *i.e.*, the lagoons and other areas where wastes were deposited.

As explained above (at pp. 2-4), the actual participation by persons having an affiliation with CPC in Ott II's management was extremely limited; the district court premised CPC's operator liability primarily on CPC's *leaving Ott I officers* (Eiszner and Ott) *in place* while assigning them separate duties for CPC. But if CPC can be held liable as an "operator" of Ott II's Muskegon facility based upon the acts of employees such as Ott and Eiszner, then any meaningful use of dual directors or officers would subject every parent corporation to CERCLA

liability for the operations of its subsidiary.[13] Because the use of officers and directors in dual capacities is a hallmark of the parent-subsidiary relationship, see HENN & ALEXANDER, *supra*, § 148 at 355, this factor is no evidence of the parent corporation's "control" over its subsidiary as urged in the petitions.

In any event, several of the cases on which petitioners rely have explicitly recognized that the mere presence of parent corporation employees in the management of a subsidiary or on its board is *not* evidence of "pervasive control" by the parent. In *United States* v. *TIC Investment Corp.*, 68 F. 3d 1082 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996), the Eighth Circuit applied a "pervasive control" analysis in deciding not to hold dual parent companies liable as "arrangers" under CERCLA Section 107(a)(3) for disposal that their subsidiaries had "arranged." The Eighth Circuit found no significance in the participation by the parents' employees in the subsidiary's management and on its board of directors: the "mere fact that * * * individuals who were officers and directors for [the parents] concurrently served as officers and directors for [the subsidiary]" did not even "*tend* to establish" liability. *Id.* at 1092 (emphasis added).

In rejecting "operator" liability in another dual-parent setting, the Third Circuit held that majority representation on the subsidiary's board, along with representation in management, did not amount to "pervasive control" of the subsidiary. *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551 (3d Cir. 1997). The Third Circuit noted that there was no evidence that the parent corporations' representatives who served on the subsidiary's board or in its management "made any decision that was dictated by [the parents] or otherwise exhibited divided loyalty when attending to [the subsidiary's] business." 124 F.3d at 564. And the Eleventh Circuit in

[13] In this regard, the United States' self-serving and unsupported assertion (Pet. 26-27) that "many parent corporations do not engage in the type of active participation and control shown here" is particularly disingenuous.



*Jacksonville Electric* similarly held that the presence of trustees of the parent as directors and officers of the subsidiary did *not* indicate pervasive control, and affirmed a defense judgment. 996 F.2d at 1010-1011.

These decisions make clear that, even under a "pervasive control" analysis, participation by a parent in its subsidiary's business through representation by parent corporation employees in management and on the subsidiary's board amounts to appropriate parental oversight and does *not* form a basis for the imposition of "operator" liability. And as the Sixth Circuit noted, nothing else in the record supports the district court's conclusion. U.S. App. 18a. Because review here could not change the ultimate result, this case would be a poor vehicle even if review of the Sixth Circuit's fact-intensive inquiry were otherwise warranted.

## CONCLUSION

The petitions for a writ of certiorari in Nos. 97-296 and 97-454 should be denied.

Respectfully submitted.

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NOVEMBER 1997